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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FERA APPEAL NO. 14 OF 2007

1. Union of India
through Deputy Director of
Enforcement, Directorate of
Enforcement (Foreign Exchange
Management Act, 1999) having his
office at Janmabhoomi Chambers,
1st Floor, Walchand Hirachand
Marg, Mumbai 400 001.

2. The Asstt. Director,
Directorate of Enforcement,
Mumbai. ... Appellants

Versus

Shri Hitendra V. Shah,
191/1 & 12, Pushpakunj,
Station Road, Wadala,
Bombay 400 031. ... Respondent

Mr. R.V.Desai, Sr. Counsel with Mrs. S.V. Bharucha and Mr. A.S. Rao for Appellant.

Mr. M.M. Patel for Respondents.

CORAM: F.I. REBELLO &
J.P.DEVADHAR, JJ.
DATED: AUGUST 31, 2007

ORAL JUDGMENT (Per F.I. Rebello,J.):

. Revenue has preferred the present appeal against the order dated 1.4.2003 of the Appellate Tribunal of Foreign Exchange, New Delhi. Before the learned tribunal the contention advanced was that the money which was brought into India would be covered by the provisions of "The Remittances of Foreign Exchange and Investment in Foreign Exchange Bonds (Immunities

and Exemptions) Act, 1991". In Paragraph 6 of the order the learned tribunal noted that the imports were in October, 1991 and as it is before the specified date set out in explanation to Section 2(b) of the Act, the Tribunal Allowed the appeal and set aside the order.

2. The present appeal raises the following questions of law :

1. Whether the provisions of "Remittances of Foreign Exchange and Investment in Foreign Exchange (Immunities & Exemptions) Act,. 1991" will be applicable to the facts and circumstances of the present case?

2. Whether in the facts and circumstances of the case and in law, the Tribunal is right in applying the provisions of "Remittances of Foreign Exchange and Investment in Foreign Exchange (Immunities & Exemptions) Act, 1991" to the present case when the said provisions are not applicable for the reason that on the facts the adjudicating authority held that the remittances in question are not "gifts" and they represent "compensation"?

3. Whether the conclusions and findings of the tribunal are against the evidence on record and therefore, perverse and also vitiated for non application of mind?"

3. We have carefully considered the provisions of Remittances of Foreign Exchange and Investment in Foreign Exchange (Immunities & Exemptions) Act, 1991 which hereinafter referred to as the "Act". Under Section 2(b), remittances means remittance made in foreign Exchange by any person resident outside India to a person resident in India on or after the date of commencement of this Act, but before the specified date, in the form of draft, traveller's cheques, cheques drawn on banks situated outside India, telegraphic transfers, mail, transfers, money orders or by way of transfer from Non-resident (External) Account, Foreign currency Non-resident Account or Foreign Currency Non resident Special Deposit Account maintained in India under the rules made under the Foreign Exchange Regulation Act, 1973.

. Then we have section 3. Section 3 (1) sets out that no recipient who claims immunity under this chapter, in accordance with such scheme as the Reserve Bank of India may by notification in the

official gazette, specify for the purpose of receiving remittances under this chapter, shall not be required to disclose for any purpose whatsoever, the nature and source of the remittance to him. Section 3(2) sets out that nothing in sub section (1) shall apply to any foreign exchange which is required to be brought in India under any of the provisions of the Foreign Exchange Regulation Act or other enactments set out therein.

. It would be clear therefore, that Section 3(i) is in the nature of an immunity to a recipient of foreign exchange from disclosure of the his source of the income, in accordance with a scheme notified by the R.B.I.

4. Then we have section 5 which has been referred to by the tribunal. Section 5 falls in chapter III. Chapter III deals with investment in 'Foreign Exchange Bonds'. Section 5(2) therefore applies only in the case of foreign exchange bonds issued in accordance with a scheme as the Reserve Bank of India may by notification specify but before the specified date. Considering Section 6 of the Act, the receiver of the foreign bonds, specified therein would be entitled to immunities as prescribed therein.

5. We may now consider the questions of law in the context of the order passed by the tribunal. The show cause notice dated 12.3.1997 had been served amongst others on the appellant herein. In the show cause notice it was set out that the appellant, a person resident in India had made payment of Rs.15,44,064/- (approx) in India during September, 1991 to May, 1992 to Niranjan J. Shah (Notice at Sr. No. 1.) without any general or special exemption granted by the Reserve Bank, as consideration for the acquisition/receipt of US $39949.42 and US $ 19962.22 outside India by said Niranjan J. Shah and had thereby contravened the provisions of Section 9(1)(f)(i) of Foreign Exchange Regulation Act, 1973 rendering himself (i.e. Notice at Sr. No. 4) liable to be proceeded against u/s. 50 of the said Act. Subsequent to the show cause notice and the reply, an order came to be passed by the Special Director of Enforcement who noted the reply dated 17.4.1997 filed by the appellant herein. It may be noted that the show cause notice came to be issued pursuant to the search conducted of Niranjan J. Shah wherein the foreign currencies and documents and two computer floppies were recovered under the panchanama. Statement of Niranjan Shah was recorded under Section 130 (4) of the Income Tax Act on 30.5.1992. Statement of one Nilesh Wadani of

Wadani Trading Company was recorded on 19.8.1993 and duly authenticated in terms of the Foreign Exchange Regulation (Authentication of documents) Ruler, 1976 in which he sets out two remittances made by him to Jayaraj Java by order of Niranjan Shah. Show cause notice had also set out that the name of the appellant figured in the list of having received inward remittances. In Para 10 of the order, a finding was recorded that the name of the appellant was appearing in the documents seized from Shri. Niranjan Shah and that this proved that these remittances were made by Niranjan Shah through Shri. Nilesh Wadhani and that all the recipients had made payment to said Niranjan Shah on consideration of foreign exchange received/acquired by Niranjan Shah in Dubai outside India for the purpose of effecting the remittances. The authority recorded a finding that it will clearly establish that Niranjan Shah had arranged to remit the said amounts to the appellants amongst others against receipt of compensation of Indian rupees and as such the provisions of the aforesaid Immunities Act are not applicable to the notices herein and thus they cannot claim immunity under the said Act.

6. After having perused the order of the tribunal it may be noted that the finding of fact recorded by the authority below had not been reversed. The

learned tribunal proceeded on the footing that the appellant had received the amount as a gift and that was within the provisions of the Act and consequently allowed the appeal, without reversing the findings and merely based on inferences.

. In our opinion if the appellate authority had to reverse the finding, it was bound to give reasons for the said reversal. We find no such finding have been recorded.

. Considering the above, in our opinion, the impugned order will have to be set aside as the tribunal has misdirected itself in law. To that extend the matter is remanded back to the tribunal for reconsideration and disposal according to law. The impugned order to that extent is set aside.

(J.P.DEVADHAR, J.) **(F.I.REBELLO, J.)**